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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 88

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Plaintiff in Error,

vs.

WILLIAM W. MARS AND C. BERT MARS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS (33,283)

BRIEF FOR DEFENDANTS IN ERROR

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PUBLISHED BRIEF COMPANY, FORT WORTH, TEXAS

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SUBJECT INDEX

		Pages
1.	Introductory Statement of Case, and of Questions of Law presented for decision	1 to 6
2.	Additional and Corrective Statement of Facts disclosed by the Record	6
3.	Brief of Argument with Citation of Authorities	6 to 37
4.	Conclusion	37 to 38

INDEX OF AUTHORITIES.

A.	American Exp. Co. v. Lindenburg, 260 U. S. 584; 67 L. Ed. 414, 418	26, 28
	Allen v. Arguimbau, 198 U. S. 149; 49 L. Ed. 980	37
	Arkansas Southern Ry. Co. v. German Nat'l Bank, 207 U. S. 270; 52 L. Ed. 201	38
B.	Bank of U. S. v. Dandridge, 25 U. S. 12, Wheat. 64, 70; 6 L. Ed. 552, 554	27
C.	Cincinnati etc. Ry. Co. v. Rankin, 241 U. S. 91, 97; 37 L. Ed. 93, 95	26, 28
	Cisco Banking Co. v. Keystone Pipe & Sup. Co., 277 S. W. 1060	28
H.	Humble Oil and Ref. Co. v. Strauss, 243 S. W. 528, par. 18. Ib. 583	27
I.	International & Great Northern Ry. Co. v. Anderson County, 106 Texas 72; Same Case, 246 S. W. 433; 62 L. Ed. 807, 816	15 to 18, 35
	I. G. N. Ry. Co. v. Oehler, 262 S. W. 785, par. 4	19, 30, 31, 32
	I. G. N. Ry. Co. v. Texas Co., 280 S. W. 282	31
	I. G. N. Ry. Co. v. Concrete Inv. Co.	51

AUTHORITIES—*Continued*

		Pages
K.	Knox County v. Nat'l Bank, 147 U. S. 90; 37 L. Ed. 93, 95, 96	26
L.	Leath v. Thomas, 207 U. S. 93; 52 L. Ed. 118	38
M.	Mercantile Trust Co. v. Binford, 6 Fed. Reporter, 2nd Series 285	7 and 31
	M. K. T. Ry. Co. of Texas v. State, 275 S. W. 673, 677, 678; Same Case, U. S. Sup. Ct. Adv. Opp. No. 3, Dated Dec. 1927; 72 L. Ed.	20, 21, 36
T.	Texas Southern Ry. Co. v. Harle, 101 Texas 170, et seqr.	17, 18
U.	United States v. Denver & R. G. Co., 191 U. S. 84	30
V.	Vandalia Ry. Co. v. Indiana, 207 U. S. 359; 52 L. Ed. 246	38
W.	Weaver v. Palmer Bros., 270 U. S. 402; 70 L. Ed. 654, 656, 658	26
	Waters Pierce Oil Co. v. Texas, 212 U. S. 86; 53 L. Ed. 417, 428, 429	37
	Western Union Tel. Co. v. Wilson, 213 U. S. 52; 53 L. Ed. 693	37, 38

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BRIEF FOR DEFENDANTS IN ERROR

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

As we understand and interpret the record in this case, the questions of law which are presented for the decision of the Court and upon which its jurisdiction rests involve the proper construction and application of Section 20a of the U. S. Transportation Act of March 1st, 1920, which is copied at length on Pages 73 to 81 of the Plaintiff in Error's Brief, and its effect on Article 6625-6422 of the

State Statute, which is also copied at length on Pages 72, 74 of said Brief. This latter Statute was enacted in 1910 as an amendment of Articles 4549 and 4550 of an older Statute, which was passed in 1889. The Amendment became effective on September 1st, 1910, and was carried without change into the subsequent revisions of the State Statute; first, as Articles 6624 and 6625 of the Revised Statutes of 1911 and 1914, and, second, as Articles 6421 and 6422 of the Revised Statutes of 1925. Section 20a of the Transportation Act consists of twelve subdivisions, of which only two, viz., Subdivisions 2 and 11, are directly involved in the questions of law here at issue. The other Subdivisions of the Section are pertinent only for the purpose of determining the purpose and scope of the Section in its entirety and as an aid to the proper construction of Subdivisions 2 and 11.

Plaintiff in Error in its brief, Pages 11 to 14, states that the two questions which are raised by this brief for the consideration of the Court are—

> "(a) Did the Act of Congress of the United States, 41 Statute at Large, 494, Section 20a of the Interstate Commerce Act (see Appendix), added by the Amendment of February 28, 1920, vest in the Interstate Commerce Commission exclusive control of the regulation of finances of carriers engaged in interstate commerce, and thereby supersede the Act of the Legisature of the State of Texas known as Section 6422 of the Revised Statutes of 1925, requiring carriers organized in the State of Texas to assume liabilities and obligations of railroad corporations purchased at a receiver's sale."

"(b) If the above question is answered in the affirmative, then is it error for the trial court to sustain the general demurrer to the defendant in error's petition, which fails to allege that the carrier has secured the consent of the Interstate Commerce Commission to assume the obligations upon which the suit is based?"

In support of its contention that both of the foregoing questions should be answered in the affirmative, Plaintiff in Error asserts and seeks to maintain (1) That Subdivisions 2 and 11 of said Section 20a of the Transportation Act control and limit the force and effect of the State Statute above referred to as to render it inoperative "unless and until, and then only to the extent that, upon application by the Carrier, and after investigation by the Commission of the purposes and uses, * * * of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption"; (2) That this requirement of Subdivision 2 of said Section constitutes a condition precedent to the plaintiff's right of recovery, and that the burden rested upon them to allege and prove, as a part of their case, that such condition had been complied with, and that in the absence of such allegation and proof the general demurrer to the petition should have been sustained. Both of these contentions were overruled and denied by the judgment of the trial court. See Record 9 to 11. And both were sustained by the majority opinion of the Court of Civil Appeals which reversed the judgment of the trial court and held that the Defendants' General Demurrer to the Plaintiffs' Petition should have been sustained for the reasons

stated in said opinion. Record 14 to 24. Associate Justice Buck dissented from the holding of the majority upon the question as to which party had the burden of proof and he held that such burden rested upon the defendant to allege and prove that it had never made application for, and obtained from the Commission any authority to assume the obligation sued on; and, hence, that the defendants' General Demurrer to the Plaintiffs' Petition should have been overruled. See dissenting opinion, Record 24 to 29. The Supreme Court upon application made therefor, granted a Writ of Error; and upon the hearing that Court reversed the decision and judgment of the Court of Civil Appeals and affirmed that of the trial court. In so doing, the Supreme Court held (1) That if the conclusion reached by the majority of the Court of Civil Appeals to the effect "that the quoted provisions of the Transportation Act have reference to the obligation upon which this suit is prosecuted, that Article 6422 of our Revised Civil Statutes properly construed, required that the M. K. T. Railway (Railroad) Company of Texas assume payment of this obligation, and that said Article in respect to the obligation is superseded by the Federal Transportation Act, is correct," yet, that "the petition as it presents a cause of action under the provisions of said Article, must be held to contain an allegation that the M-K-T Railroad Company of Texas has assumed the obligation. If the obligation could be assumed in no other way than that provided in the Transportation Act an allegation that it was assumed is sufficient as against a general demurrer;" (2) "That Section 20a, Subdivision 2 of the Federal Transportation Act above quoted does not have the effect to limit the power of the State to impose a lien upon the

property of railroad companies engaged in Interstate Commerce to secure the character of claims and obligations enumerated in Article 6422," and (3) That "the M-K-T Railroad Company of Texas purchased the property of the M-K & T. Railway Company of Texas burdened with a lien to secure the obligation involved in this suit and cannot resist foreclosure of the lien on the theory that it has unlawfully assumed payment of the obligation. Whether it assumed payment is immaterial. Plaintiffs in Error have the right to foreclose their lien."

In addition to the statement of the case made by the Plaintiff in Error, Defendant in Error submits the following additional—

STATEMENT.

Counsel for Plaintiff in Error are incorrect in their statement to the effect, that the franchise of the old company was sold at the Receiver's sale to the purchasers of its properties and that such sale was confirmed by the Court in which the receivership proceeding was pending. On the contrary, the record does not disclose any such sale or attempted sale of such franchise of the sold out company. The statement in question is found on Page 8 of Plaintiff in Error's Brief and was doubtless unintentionally made.

The plaintiffs by their petition not only asserted and sought to recover a personal judgment against the defendant for the amount of the claim sued on, but they also asserted and sought a foreclosure of the Statutory lien imposed by Article 6422 of the State Statute quoted above, on all of the properties of the old company which

were subsequently acquired by the new company and which were being operated by it under its new Charter. See Record Pages 1 to 5. This lien was recognized and was foreclosed by the judgment of the trial court, and the properties described in the petition were ordered sold for the satisfaction of the judgment rendered. Record 9 to 11. All of the Courts held that the claim sued on came within the purview of Article 6422. See majority opinion of the Court of Civil Appeals where in it is said, "We are all of the opinion that the claim herein involved is of a character coming within the terms of Article 6422." Record 19. See also judgment of the trial court to the same effect. Record 10 near bottom of page, and opinion of Supreme Court quoted above.

It was alleged in the Plaintiffs' Petition that the properties of the old company which were sold at the Receiver's sale, were by the decree of the United States District Court ordered sold and the sale thereof was approved by said Court "subject to the rights, claims and equities of all persons and claimants having claims against said company and its properties such as are mentioned and provided for in Article 6625 of the Revised Statutes of the State of Texas." It was also alleged that said properties were finally transferred to and were accepted by the purchasing company subject to the provisions of said Article. See Paragraph 5 of the Plaintiffs' Petition. Record 2 to 4.

BRIEF OF ARGUMENT.

Replying to the several contentions so made by the Plaintiff in Error, Defendants in Error contend (1) That Section 20a of the Transportation Act has no application to claims or obligations owing by the old corporation of

the character and class enumerated in Article 6422 of the State Statute and that there is no conflict between this Article of the Statute and Section 20a of the Transportation Act. (2) That the provisions of said Act do not conflict with and render inoperative said Article 6422 of the State Statute in so far as it imposes a lien or charge on the sold out properties of the old corporation to secure the payment of claims of the character and class of the one here sued on. On the contrary, we contend that the imposition of such a charge and lien on such property was a valid exercise of the State's authority over such property, and that such statutory lien followed the property into the possession of the purchasing corporation, without restriction by the provisions of Section 20a of the Transportation Act. See—

Mercantile Trust Co. v. *Binford*, 6th Federal Rep. (2nd Series), 285 U. S. District Court.

(3) That if it should be held that there is a conflict between the provisions of said Section 20a of the Transportation Act and those of Article 6422 of the State Statute as asserted by the Plaintiff in Error, and if it be true that the said Plaintiff in Error could not legally assume or become liable for the claim herein sued on, and that it could not purchase and acquire title to the sold out properties of the old corporation, subject to the charges imposed on same by the State Statute; without first obtaining from the Interstate Commerce Commission authority to do so, and if the Plaintiff in Error failed to obtain such authority, such facts constituted matters of defense which it was incumbent on the defendant to allege and prove and, in the absence of such allegation and proof it will be presumed that it had the required authority to do what it

assumed to do. In other words, the presumption of right conduct on the part of the officers and directors of the corporation will be indulged.

It should be stated in this connection that it was alleged in the Plaintiffs' Petition that at the Receiver's sale of the properties of the old company said properties at said sale were sold to and were purchased by Francis F. Randolph and Hugo Blumenthal, who purchased same for themselves and their associates, with the view and for the purpose of acquiring title to said properties and of forming and organizing a corporation to acquire, hold and operate said properties as a common carrier under and in accordance with the laws of the State of Texas, and particularly under and in accordance with said Article 6625 of said statutes. Said purchasers and their associates thereupon associated themselves together and prepared and presented to the Secretary of State of and for the State of Texas, for his approval and for filing in his office, a charter, which was duly approved and filed by said Secretary of State, whereby a new corporation which was named and designated as "Missouri-Kansas-Texas Railroad Company of Texas," was duly formed and (fol. 5) incorporated under and in pursuance of the laws of the State of Texas as a common carrier "for the purpose of acquiring, owning, maintaining and operating the lines of railway formerly owned, leased or operated by the Missouri, Kansas and Texas Railway Company of Texas," all of which were situated in the State of Texas. Said company having been thus incorporated, same was duly organized and the properties formerly owned by said Missouri, Kansas and Texas Railway Company of Texas were thereupon transferred, conveyed and assigned to said

"Missouri-Kansas-Texas Railroad Company of Texas" and said sale, transfer, conveyance and assignment was thereupon duly reported to the Honorable United States District Court for the Northern District of Texas at Dallas, for its approval and confirmation. Said Court, upon the hearing of said report, on to-wit, the 13th day of February, 1923, duly approved and confirmed said sale, transfer, conveyance and assignment, subject, however, to the terms and provisions of said Article 6625 of the Revised Statutes of Texas. And said properties were thus finally transferred to and were accepted by said purchasing company, subject to the provisions of said Article and to the laws of the State of Texas. Said company having so acquired and taken possession of said properties, began operating and it is yet operating same as a common carrier." Record 3 and 4.

This allegation was not contested otherwise than by the defendant's General Denial. Record 7 to 9.

Addressing ourselves to our several contentions in the order above stated, we respectfully submit:

First: That the class of claims, obligations and liabilities enumerated and defined in Article 6422, formerly 6625, of the State Statute do not fall within the class of obligations and liabilities collectively termed "Securities" as that term is used and defined in Section 20a of the Transportation Act, and particularly is this true of the claim herein sued on.

Let us examine this section, and ascertain, if we can, just what class of securities and obligations it was intended to cover and include in the collective term "Securities," and what transactions by the carrier it was intended to

prohibit "unless and until" the consent of the Interstate Commerce Commission was applied for and obtained, authorizing the carrier to assume such liabilities, etc.

This Section 20a, which was added to the Interstate Commerce Act by the Transportation Act of 1920, provides that it shall be unlawful for any interstate carrier to issue or assume "securities" of a designated nature, without authority from the Interstate Commerce Commission. This Act is very specific in defining the nature of "securities" which carriers are thus prohibited from issuing or assuming, and under the specific wording of the statute, it is manifest, we think, that it does not apply to liabilities and claims for death and for personal injuries sustained in the operation of the railroad by the Company or by any Receiver thereof, and for loss of, and damage to, property sustained in the operation of the railroad by the Company or any Receiver thereof, which claims are made a charge upon the property, under Article 6624 and 6625 of the Texas Statutes. (1914.)

The Transportation Act defines two classes of securities which must have the authorization of the Interstate Commerce Commission, viz., first, securities which are issued and, second, securities which are assumed. It is obvious that the first class of securities has no relation to the Texas Statute, for there could be no contention that the Texas Statute requires or has reference to the issuance of any securities.

The Statute next provides that it shall be unlawful "to assume any obligation or liability as lessor, lessee, grantor, endorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial." It will be noted that the prohibition of the Statute applies not to

the assumption of any obligation or liability as such, but merely to the assumption of any obligation or liability "in respect of the securities of any other person." Just preceding this provision, securities are carefully defined as: 1, any share of capital stock; 2, any bond; 3, any evidence of interest in; 4, or indebtedness of the carrier. It is clear that a claim for death or personal injuries or damage to property thereof is not comprised or included in any one of these four classes of securities. Such a claim is certainly not a share of stock or a bond; neither is it an "evidence" of interest in or indebtedness of the carrier. The Act makes it perfectly plain that the "evidence" of indebtedness which is referred to is such an evidence as could be "issued" by the carrier; in other words, that it is a security as that term is usually understood in the financial world. The remainder of this section of the Transportation Act makes this intention even clearer. It is further provided in Subdivision 11 of the Section that where such securities are issued or assumed without authority of the Commission and are acquired by innocent purchasers for value, that the person so purchasing same may recover the full amount of damages sustained by him against the carrier which issued the securities or assumed the obligation so made void. The Act further provides that an innocent purchaser of such securities may hold jointly and severally liable for the full amount of damages sustained by him, in respect thereof, the carrier which issued the security or assumed the obligation or liability so made void, and its officers, directors, attorneys and other agents of the carrier who participated in any way in authorizing or selling the security or in authorizing the assumption of the liability so made void.

Again the Act provides that any officer, agent or attorney of a carrier who knowingly assents to or concurs in any issue of securities or assumption of liability forbidden in the Act without authority from the Commission, shall be punished by both fine and imprisonement.

It seems to us from the context of this Statute that it was intended to apply only to the issuance and assumption of securities as that term is ordinarily understood, and that the Act does not, and was never intended, to apply to or control claims for tort on account of personal injuries, death, or damage to property which are referred to in the Texas Statute.

It would, we think, scarcely be contended that if the carrier should purchase a tract of land incumbered by a mortgage, that it could hold the land without being required to pay off the mortgage, even though the matter had never been presented to the Interstate Commerce Commission. And yet, this is the same character of liability which the Texas Statute imposes. The purchaser of the road acquires the property charged with a debt and if the carrier intends to retain the property this debt must be satisfied.

Certainly no one could reasonably contend that the authority of the Interstate Commerce Commission was necessary to render the carrier liable for the debts which were charged upon the property by the Receivership Court. When the purchasing carrier took the property at the Receiver's sale, the orders of the Federal Court and the deed conveying the property provided that the purchaser receiving the property should pay off such of the debts of the Receiver and the sold-out railroad as were

specified in the Court's decree, and it was expressly provided in the decree "That nothing herein contained shall be deemed to affect any suit or proceeding brought pursuant to Article 6625 of the Revised Statutes of the State of Texas." In other words, the purchase of the property under the Court's orders imposes upon the carrier even a greater burden than does the Texas Statute, and yet there has never been any contention that such obligations would have to be authorized by the Interstate Commerce Commission before they would be valid.

Unquestionably the primary purpose of Section 20a of the Transportation Act was to control the issuance and assumption of railroad securities, and it does not attempt to control claims for tort against the Receiver of the old road which are governed by the Texas Statute.

Paragraph 1 of the Section simply defines the word "carrier," as it is used therein. Paragraph 2 provides, that after the date specified, "it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed securities), or to assume any obligation or liability, as lessee, guarantor, indorser, surety or otherwise, in respect to the securities of any other person, natural or artificial, even though permitted by the authority creating the corporation, unless and until, and then only, to the extent that upon application by the carrier and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability, in respect of the securities of any person, natural or artificial, the Commission by order authorizes such issue or assumption."

Paragraph 3 of the Section, confers on the Commission the power and authority to grant, or deny, or to grant with modification, any such application.

Paragraphs 4, 5 and 6 prescribe the requisites of such applications, notice thereof, and proceedings with reference thereto.

Paragraphs 7 and 8 are not important here.

Paragraph 9 excepts short time notes, and some other classes of securities, from the operation of the Section.

Paragraph 10 relates to reports made by the carrier to the Commission.

Paragraph 11 declares, that any security issued, or any obligation or liability assumed, by the carrier, for which the authorization by the Commission was required, should be void, if issued or assumed without such authorization therefor having been first obtained, etc. That paragraph also authorizes innocent holders of such void obligations, to sue the carrier issuing same and its officers, for the damage sustained by their wrongful acts in issuing or disposing of such securities, and it provides severe penalties for the violation of the provisions of the Section.

Paragraph 12 prohibits any person from holding the position of officer or director of more than one carrier, unless such holding was authorized by the Commission; and it provides penalties for such violation of such paragraph.

If any part of the Section has reference to such transactions as the one involved in the instant case, it is that of Paragraph 2 copied above, which prohibits any carrier "to assume any obligation or liability, as lessor, lessee,

guarantor, indorser, surety or otherwise, in respect to the securities of any other person, natural or artificial."

Now, it is our contention, that this language does not include or embrace within its terms or its spirit, the transaction in question, whereby defendant, as a consideration for the rights, privileges and franchises granted to it by the State, assumes and becomes obligated to pay such liabilities of the sold-out company, as are enumerated in Article 6625-6422, payment of which was secured by a lien imposed by said Article on the property so sold and purchased.

This transaction was in truth in fact, a grant by the State to the defendant, of the rights, privileges and franchises which the charter conferred, among which was the right to exist and operate the properties so purchased as a corporation. As an incident to, and as a consideration for such grant, the defendant was required to take and hold said property, subject to the lien imposed thereon by the Statute, and to assume the payment of the claims provided for in the statute under which the charter was issued.

This transaction was in reality, a purchase of its charter rights, privileges and franchises, without which it could not exist or operate as a corporation; and the assumption of the payment of such claims was a part of the purchase price for its charter, and of the rights thereby conferred on it.

Our Supreme Court, in deciding the case of *I. & G. N. Ry. Co. v. Anderson County*, which involved the right of the purchasing company to move the offices and shops of the Company from Palestine to Houston, used the following language, viz.:

"It must be remembered that the relation of the plaintiff in error to this railroad is not that sustained by a company to a railroad which has been constructed under its own charter, or which is unaffected by previous statutory or charter obligations. Its corporate right issues from the ownership of the franchise and property of a former railroad company, since Article 6625 conferred upon its incorporators the right of incorporation only in virtue of such ownership. The rights which it possesses and is permitted to exercise in respect to the railroad are founded upon that franchise. It sustains its right of ownership of the property. The plaintiff in error could not succeed to the property without it, since neither is alienable except by statutory consent, and under our statutes one may not be acquired without the other. Sustaining this vital and inseparable relation to the railroad and the title by which it is now held, the plaintiff in error, in our opinion, could not acquire the franchise, and may not exercise the rights in the property which result from its ownership, freed from the limitations to which it was subject in the hands of the former company. The obligation to which that company was subject, according to the petition, in respect to the location of its general offices, machine shops and roundhouse, was clearly a burden upon the franchise, with which it is likewise charged in the hands of the plaintiff in error." 106 Tex. 72.

This case reached the U. S. Supreme Court by writ of

error. That court, in affirming the judgment of the State courts, said:

> "The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the states, since the road concerned has expended and now is largely engaged in such commerce. The jury found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced, the verdict must be accepted; and although no doubt there might be cases in which this court would pronounce for itself, irrespective of the testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers. The burden, if any, is indirect." 246 U. S. 433, 62 L. Ed. 816.

As bearing on and elucidating the question here under investigation, we refer the Court to the decision of our Supreme Court, rendered in the case of *Texas Southern Ry. Co.* v. *Harle*, 101 Tex. 170, 80 et seqr. In this case, the property of an insolvent railway company, was sold at a receiver's sale, and was purchased, ostensibly, by Mrs. Harle, a married woman. At the instance of the purchasers of the property, a new corporation was organized and incorporated under and in pursuance of Article 4549 and 4550 of the Revised Statutes, as same then existed, to take over and operate said properties; but it appears that no formal transfer was ever made by Mrs. Harle to

the new corporation, of a part of the properties purchased at the receiver's sale, and which had been conveyed to her. She refused to make such transfer, and the company brought suit to remove the cloud upon its title caused by her claim to the property, which was in controversy. She prevailed both in the trial court and in the Court of Civil Appeals, and the Supreme Court granted a writ of error. That court, in deciding the controversy thus presented, held, that by the incorporation of the new company under the Articles of the Statute above referred to, the title to the property and the franchise to operate same, passed to and became vested in said corporation, without any transfer from Mrs. Harle. This ruling was based on the fact that she, as a purchaser at the receiver's sale, had joined in the organization and incorporation of the new company. In so holding, the Court said:

> "It follows that when such a purchase is made, the purchaser holds that which he purchased as an entire thing (Central & M. R. R. Co. v. Hennig, 52 Texas 476); that he acquires the other property necessary to enable him to exercise the franchise; that he is permitted to acquire all and to possess the powers and privileges of the sold-out company only because he assumes the obligations arising from the possession of such property and of such powers and privileges." 101 Tex. 182.

At the time this decision was rendered in 1907, the Article of the Statute above referred to had not been amended. But in 1910 these articles were amended, and as then amended, they became Articles 6624 and 6625 of the 1914 Statutes; and they now constitute Articles 6421

and 6422 of our 1925 Statutes. The caption of the Amendatory Act reads in part as follows, viz.:

> "An act to amend Articles 4549 and 4550, Chapter Eleven, Title XCIV, of the Revised Statutes of the State of Texas, and prescribe the conditions upon which the purchaser, or purchasers, and associates, if any, of the property and franchises of a railroad company may become owners of its charter, or may organize a new corporation."

See Acts of the Fourth Called Session of the 31st Legislature, page 120.

The purchasers of the properties of the old company, by the incorporation of the new corporation, transferred to it the properties in question, subject to all of the conditions, limitations and liabilities specified in said Article 6025.

These provisions of the law under which the charter was granted to the new corporation, thus became a most material part of the charter contract, and the consideration for which the charter was issued. The charter is essential to the defendants' ownership and operation of the property, and without it, the corporation has no right to operate the railway as a corporation. *See I-G-N R. R. Co. v. Oehler*, 262 S. W. 785, Par. 4, Writ of Error refused.

The charter and the property must be considered and held together as an entirety, as necessary parts of a whole and they cannot be separated the one from the other. *See Texas Southern Ry. v. Harle*, 101 Texas 180, et seq.

Keeping this fact in view, we can readily see that to invalidate the obligations imposed on the defendant by

the statute, and by the charter issued thereunder, will not only invalidate the charter, but destroy the defendants' title to the properties which it now holds and is operating under and in pursuance of the charter.

See *M.-K.-T. Ry. Co. of Texas* v. *State*, 275 S. W. 673, 677, 678; decision by the Court of Civil Appeals of the Third District, wherein the Court said:

> "The form of language of the charter or franchise of not of essential importance, since it can grant no power not authorized by basic law. Railway Co. v. Railway Co., 68 Tex. 176, 4 S. W. 534; Irrigation Co. v. Vivian, 74 Tex. 173, 11 S. W. 1078; Tram Co. v. Bancroft, 16 Tex. App. 170, 40 S. W. 839; Ry. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778. So it was only by a compliance with the terms and conditions of Article 6625, R. S. 1911, that appellant railroad was authorized to form the corporation in this case and to become the purchaser of the physical properties and franchises of the sold-out corporations as consolidated by the agreement and judgment in question, including those of the Missouri, Kansas & Texas Ry. Co. of Texas. A compliance with this article breathed into it its very life and existence. By that article, the "properties and franchises" were secured. No new franchises or charters were issued, but its compliancee with the Statute secured a legal transfer to it of the properties and franchises of the sold-out corporations. These properties and franchises of the sold-out corporations are dealt with conjunctively by these statutes, and

title thereto passes conjunctively, charged with and subject to the payment of the liabilities there named. These rights and powers granted by the State are valuable to the recipient, and also represent a sacrifice by the State. They confer benefits, etc., that cannot be otherwise obtained, and fairness and equity require those receiving them to also assume the burdens imposed whether that be by contract or law." W. of E. refused.

This case reached the U. S. Supreme Court by Writ of Certiorari, which was vacated and dismissed by the Court for want of substantial basis in the record. See Adv. Opp., dated Dec. 1st, 1927, No. 3, page 121; 72 L. Ed.

In view of these facts, we cannot conceive that Section 20a has any application to the question here at issue. We think that the manifest purpose of that Section was to prevent the unauthorized mergers of separate and independent carriers, either by common officers and interlocking directorates, or by the purchase by one company of the securities of the other, so as to bring about any unauthorized combination of the interests of both under a common management, to the detriment of interstate commerce. No such result is shown in the instant case.

On the contrary, the new corporation is merely a successor to the properties, rights, privileges and franchises of the old corporation, with the authority to operate the same properties, in the same way, and for the same purpose, as did the old corporation. In other words, the entire transaction amounts only to a sale by the old corporation, through the medium of the receivership proceedings, to the new corporation, of the properties of the

old company, which sale was approved by the State by the issuance of the new charter to the new company, which completed the transfer of the properties and franchises.

This new corporation has thus become the successor of the old corporation, to all of the rights, privileges and franchises of the latter; and the title to the properties of the old company, has thus passed to and vested in the new company, freed from most of the debts and obligations of the old one, but subject to certain specified obligations and liabilities of the old company, which are usually classed as operating expenses.

Viewed in its proper setting, this entire proceeding is tantamount to a reorganization of the properties, rights and franchises of the old company, in the hands of the new owners, and under a new management, which has taken over and is managing the same properties, in the same way, and for the same purpose as did the old company.

There is no merger here by one carrier of the properties or securities of one carrier, with the properties and securities of another carrier; and since there has been no violation of any of the provisions of Section 20a of the Transportation Act, it has no bearing on or application to the question here at issue; but same is controlled solely by Article 6422 of the Revised Civil Statutes of the State. (1925.)

Second: But if we should be mistaken in our construction of the Federal Act, then how stands the case? Does the allegation and proof by the plaintiffs of compliance by the defendants, with the provisions and requirements

of that Act, as the majority of the Court of Appeals holds, become a material part of the plaintiffs' cause of action against the defendant, and constitute a condition precedent to the maintenance thereof?

We have examined the numerous authorities cited in the majority opinion of that court, and we do not believe they sustain the conclusions reached by the court on this question. These authorities, one and all, only announce the familiar rule, that where an exception in a grant withdraws from its operation some part or parcel of the thing granted, which but for the exception, would have passed to the grantee, the effect is as though the thing so excepted had never been mentioned in the grant.

And the same rule applies to rights created by a Statute on which the plaintiff relies for a recovery. But in both instances, the exception must be contained in the granting clause of the grant, and not in some other instrument or statute, or even in a subsequent section of the same statute; unless, as is held in some of the cases, there should be special circumstances making proof of a negative fact a part of the plaintiffs' case. See authorities cited in the majority opinion of the Court of Appeals. Record 18 to 25.

No such special circumstances have been shown in the instant case. Here the plaintiffs' cause of action against the defendant is predicated and rests on the provisions of Article 6422 of the Texas Statutes of 1925, formerly Article 6025 of the prior Statutes. This Statute, which is complete in itself, contains no reference to any other Statutes, which is in any way in conflict therewith. Neither does the Federal Statute in question make any reference whatever to the State Statute, or in terms or by necessary

implication, purport to place any limitation thereon.

If such is the effect of the Federal Act, it must be because same covers, and purports to inhibit, such transactions as are also covered by the State Statute, and this because of the superior authority and effect of the Federal Act. But if this contention should be upheld, it does not follow that the plaintiffs' cause of action is based on the rights granted them by Section 20a, or that proof of compliance by the defendant with its requirements, is a condition precedent to the maintenance of the plaintiffs' cause of action against the defendant.

Most certainly, the plaintiffs did not base their cause of action against the defendant on the provisions of the Federal Statute, and no recovery was sought thereunder. On the contrary, the action was based on the provisions of Article 6422 of the State Statute, which the Court of Appeals holds is limited by the Federal Statute to such obligations only as the Interstate Commerce Commission, by its order previously entered, authorizes the carrier to assume and pay.

If this holding be correct, its effect will be to render nugatory the State Statute, in so far as it pertains to the assumption by the new corporation of such obligations of the old company, as are therein designated; and this for the reason that the Federal Statute, having covered and occupied the same field as the State Statute, the latter has become inoperative, in so far as it relates to the same matters covered by the former.

Whether this be true or untrue, presents a mixed question of law and fact, which is defensive in its nature, and which must be established by pleadings and proof.

Now the question is, on whom rests the burden of proof on this issue?

The majority opinion of the Court of Appeals holds that it rests on the plaintiffs, and that they must by pleading and proof show, as a part of their case, that their claim against the defendant is within the class which the carrier has been authorized by the Commission to assume and pay, as provided for in Section 20a of the Transportation Act.

This holding we contravert, and in accordance with the authorities cited in Justice Buck's dissenting opinion and in accordance with the holding of our Supreme Court in the instant case, we assert that the burden rests on the defendant to allege and prove, as a part of its defense to the plaintiffs' action;

(1) That the obligation and claim sued on by the plaintiffs comes within the class of securities designated in Section 20a of the Transportation Act, which the defendant is prohibited by said Section from assuming without having first obtained from the Interstate Commerce Commission authority to do so;

(2) That it had never obtained such authority; and,

(3) That for this reason the obligation assumed by the defendant when it obtained its charter from the State, to pay the claims of the class and character designated in Article 6422 of the State Statute, was illegal, null and void because prohibited by Section 20a of the Transportation Act.

In support of our contention on this proposition, we cite the following authorities, viz.:

Weaver v. *Palmer Bros.*, 270 U. S. 402, 70 L. Ed. 654, 656, 658.

Am. Exp. Co. v. *Lindenburg*, 260 U. S. 584, 67 L. Ed. 414, 418.

Cincinnati, etc. Ry. Co. v. *Rankin*, 241 U. S. 91, 97, 37 L. Ed. 93, 95.

The foregoing authorities, with many others, are cited and quoted from, in the dissenting opinion of Justice Buck, to which we refer the Court as expressing our views on the question here at issue. To the same effect, see the opinion recently rendered by the Commission of Appeals, Section A, *Bank* v. *Bank*, reported in 291 S. W. 207, where in that Court said:

> "We will not presume that any man or institution was transacting business in this State, in violation of the laws of State, until the contrary is shown."

In the case of *Knox County* v. *Nat'l Bank*, 147 U. S. 90, 37 L. Ed. 93, 98 and 96, the Court, in passing on the validity of municipal bonds, which involved the validity of an election authorizing same, said:

> "Again, the election was held, the votes cast at that election were canvassed by the proper officers, and an order made by the county court for a subscription in accordance with the terms of the order for the election. From these facts it may be presumed that proper notices of the election were given; for it is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with

it a presumption of the due performance of the prior act."

In *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheaton 64, 70 (p. 552, 554), it was said:

> "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of corporations are to be presumed rightfully in office; acts done by the corporation which presupposes the existence of other acts to make them legally operative are presumptive proofs of the latter. * * * If the officers of the corporation openly exercise a power which pre-supposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed * * * In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them as matters of right or matters of duty." Loc. Cit. 95, 96.

Humble Oil & Ref. Co. v. *Strauss*, 243 S. W. 528, 538, Par. 18, wherein Judge Huff, Chief Justice of the Court of Civil Appeals of the Seventh District, in writing the opinion of the court, said:

> "There will be no presumption that the parties intended to enter into an ultra vires contract, but the presumption is that they knew the powers of the corporation, and the law with reference thereto, and that they intended to obey the law."

Cisco Banking Co. v. *Keystone Pipe and Supply Co.*, 277 S. W. 1060, decided by the Commission of Appeals, Section B, holding to the same effect, viz., that the presumption in such cases is in favor of the validity of contracts entered into by corporations.

Undoubtedly, this is a rule of law of very general application.

Recurring to the cases of *American Ry. Co.* v. *Lindenburg*, 260 U. S. 584, 67 L. Ed. 414, 418, and *Cincinnati, etc. Ry. Co.* v. *Rankin*, 241 U. S. 319, 327, 60 L. Ed. 1022, 1026, cited above, we believe these cases are in point, and decide the question here at issue relative to the burden of proof, in favor of our contention.

In each of these cases, the question decided, was whether the burden rested on the carrier, to allege and prove that it had obtained from the Interstate Commerce Commission, authority to promulgate and put into effect a special rate which was based on special provisions of the shipping contract under which the freight moved; or whether the burden rested on the shipper to disprove such authority.

If such authority had been given by the Commission, as required by the Carmack Amendment as amended by the first Cummings Amendment to the Interstate Commerce Act, the rate and the provisions of the shipping contract based thereon were legal. Otherwise same were illegal, and the provisions of the contract which were in question, constituted no defense to the action.

In each case, the court held that the carrier was entitled to the presumption of right conduct, and that in the ab-

sence of proof to the contrary, it would be presumed that it had secured from the Commission authority to use the contract in question, which was presumed to be legal in the absence of proof to the contrary. And hence it was held that the burden rested on the shipper to prove that the carrier had not obtained such authority from the Commission, and hence that such a contract was illegal. See same authorities cited in the dissenting opinion of Judge Buck in the instant case.

Now, if such presumption will be indulged in favor of the carrier in such cases, why not the same presumption be indulged in favor of the plaintiffs, and against the carrier in the present case?

We fail to see any difference in principle in the two cases, and we believe there is no such difference.

If we are right in this contention, it would seem to follow that the judgment rendered by the trial court was correctly affirmed by the Supreme Court and this, regardless of any limitation placed on the State Statute by Section 20a of the Transportation Act. This is true for the reason that there was neither allegation nor proof showing or tending to show that the defendant—plaintiff in error—did not in fact have the required authority from the Commission to do what it did. If it did not have such authority, it knew this fact and could easily make such proof, but to this day there is not a vestige of proof, or even an allegation in its answer, that it had no such authority. Assuming that authority was necessary to legalize its action, and that such action taken without such authority was illegal, the natural inference, in the absence of pleading and proof to the contrary, would be that the

defendant hade made, applied for, and had obtained from the Commission the authority necessary to render its action legal. In this state of the record, we submit that the inquiry as to whether Section 20a of the Transportation Act is, or is not, in conflict with Article 6422 of the State Statute and as to whether said Article of the Staute was or was not controlled and rendered inoperative in whole or in part by said Section of said Act has become immaterial and unnecessary to a decision in this case.

See *United States* v. *Denver and R. G. Ry. Co.*, 191 U. S. 84, 91 to 93; 48 L. Ed. 106, 109.

Third: If it should be held that we are mistaken in this view of the case and that the defendant—plaintiff in error—could not legally assume or bind itself to pay the obligation of the old company, for which judgment was rendered against it, we still contend, as was held by our Supreme Court in the instant case, "that Section 20a, Subdivision 2, of the Federal Transportation Act above quoted does not have the effect to limit the power of the State to impose a lien on the properties of the railroad companies to secure the character of claims and obligations enumerated in Article 6422." * * * "The M-K-T Railroad Company of Texas purchased the property of the M-K & T Railway Company of Texas burdened with a lien to secure the obligation involved in this suit and cannot resist foreclosure of the lien on the theory that it has unlawfully assumed payment of the obligation. Whether it has assumed payment is immaterial. Plaintiffs in Error (Defendants in Error in this Court) have the right to foreclose their lien." Record 32, 33, 34. 298 S. W. 271. To the same effect are the following decisions, all of which were approved by our Supreme Court, viz.:

International-Gaert-Northern Railroad Company v. *Oehler*, 262 S. W. 785. W. of E. Ref.

I-G-N Railroad Co. v. *Concrete Investment Company*, 263 S. W. 265, 268, 269, paragraphs 4 and 5. This case was decided by the Commission of Appeals and the judgment recommended was adopted by the Supreme Court. Ib. 271.

I-G-N Railroad Company v. *Texas Company*, 280 S. W. 282. Wr. of E. Ref.

Mercantile Trust Co. v. *Binford*, 6th Fed. Rep. (2nd Series) 285, Par. 4, page 287. U. S. Dist. Court holding that the State had the authority to impose by Statute such lien on such property and that the Statute was valid.

These cases all sustain the validity of the lien and charge imposed by the Statute on the properties of the old corporation to secure the payment of the obligations enumerated therein. If that lien is valid and enforceable, in the instant case, against the properties of the old corporation, it is clear that the plaintiff in error was not injured by the personal judgment rendered against it.

See authorities cited above.

In the case of *I-G-N R. R. Co.* v. *Oehler*, 262 S. W. 785, Par. 8, page 789, the Court in its opinion said:

> "A personal judgment for money can always be satisfied by the payment of money. Such a judgment against an owner holding property subject to forced sale does not become more burdensome than the legal establishment of a claim against the property except when the personal

> judgment exceeds the value of the property. As long as the owner can discharge the liability by selling the incumbered property, he sustains no injury by reason of the particular form of the judgment. The courts will judicially know that the value of the claims which this statute undertakes to perpetuate and protect is small when compared with the value of railway property held subject to their payment."

A writ of error was refused in this case and it has been repeatedly cited with approval by our Appellate Courts.

In support of its primary contention as to the scope and effect of Section 20a of the Transportation Act, the plaintiff asserts and seeks to maintain its contention (1) That Congress by said Section had entered the entire field of the control of the finances of interstate carriers; (2) that this field embraces and includes the assumption by the carrier of all such obligations and liabilities as those here in question and (3) that such assumption imposes an undue burden on interstate commerce in violation of said Section 20a and of Subdivision 3, Section 8 of Article One of the Constitution of the United States. As we understand and construe the facts and issues here involved, the authorities cited by Plaintiff in Error have no application, and this for the following reasons, viz.: First: Because Section 20a of the Transportation Act by its own terms prescribes and limits the field intended to be covered by and included within its provisions (1) to the issuance of "any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this Section collectively termed Securities) and/or (2) to the assumption of "any obligation or lia-

bility, as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the Securities of any other person, natural or artificial"; Second: Because, as we have endeavored to show and believe we have shown that these terms of the Statute fairly construed do not include the class of obligations and liabilities enumerated in the State Statute, and which are involved in this litigation, and, hence, that they do not come within the purview of Section 20a. To this contention, Plaintiff in Error replies that, if this be true, yet, nevertheless, the Interstate Commerce Act with its amendments, including the Transportation Act and said Section 20a thereof, evidences an intention on the part of Congress to cover and occupy the entire field which in any way involves the finances and financial operations of common carriers which are engaged in interstate commerce, and that this is true even though the particular class of transactions here involved is not mentioned in the act in question. In other words, the contention is, that since the Federal Act has included within its terms certain defined classes of obligations of interstate carriers, the Federal Government has entered and occupied the entire regulatory field of all classes of financial obligations of such carriers which might in any way affect interstate commerce, and this to the exclusion of any and all regulations relating to such obligations by the several States. Is this contention sound and can it be successfully maintained? We do not think so and for the following reasons, viz.:

If it be conceded, as we think it must be, that the definition contained in Subdivision 2 of Section 20a of th Transportation Act of the class of obligations therein col

lectively defined as "Securities" does not include the class of obligations referred to in the State Statute, then we submit that the express mention of the classes of "securities" defined in said Section is tantamount to the exclusion of other classes not therein mentioned. That it was not intended by said Act to include within its terms all classes of obligations of such carriers, which might be collectively termed "Securities" is clearly shown by Subdivision 9 of said Section which expressly excludes from the operation thereof "notes to be issued by the carrier maturing not more than two years after the date thereof, and aggregating (together with all other outstanding notes of a maturity of two years or less) not more than five percentum of the par value of the securities of the carrier then outstanding." Clearly here is a large class of "Securities" which are not included within the class defined in said Section and to which the Section has no application whatever.

Manifestly, if this be true, it cannot be true as contended by Plaintiff in Error, that the Federal Government by the enactment of said Section, had occupied the entire field pertaining to the finances and financial operations of carriers engaged in interstate commerce, to the exclusion of all regulation thereof by the several States.

If such an effect cannot be ascribed to said Section 20a, then the assumption of such exclusive authority by the Federal Government must of necessity rest on some other provision of the Interstate Commerce Act, or on some provision of the Constitution of the United States. The only such provision referred to by Plaintiff in Error in support of its contention is Subdivision 3 of Section 8, Article 1 of the Constitution. That this Section of the

Constitution has no such all inclusive effect on the State Statute as is contended for by Plaintiff in Error was decided by this Court in the case of *I. & G. N. Ry. Co.* v. *Anderson County*, 240 U. S. 433; 62 L. Ed., 816, wherein the Court in passing on what we conceive to be the same question of law which is here involved, viz.: The validity and effect of Article 6625 of the State Statute here in question, said—

> "But, furthermore, when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. Interstate Consol. Street Ry. Co. v. Massachusetts, 207 U. S. 79, 52 L. Ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555. We agree with the state courts that the condition was imposed.
>
> "The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the states, since the road concerned has expended and now is largely engaged in such commerce. The jury

found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon (434) the testimony adduced, the verdict must be accepted; and although no doubt there might be cases in which this court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the state has transcended its powers. The burden, if any, is indirect."

In the instant case, the trial court found the facts which brings it within the rule thus announced in the case cited.

To the same effect was the holding of the Court of Civil Appeals and of our Supreme Court in the case of *M.-K.-T. Railroad Company of Texas* v. *State*, 275 S. W. 673, 677 and 678. This case reached the U. S. Supreme Court by Writ of Certiorari which was vacated and dismissed by the Court "for want of a substantial basis in the record."

See Adv. Opp. dated Dec. 1st, 1927, No. 3, Page 121; 72 L. Ed.

Now if these decisions announce the law correctly, as we believe they do, Article 6625-6422 of the State Statute is not repugnant to, or in conflict with either Section 20a of the Transportation Act, or the Constitution of the United States. It should be noted in this connection that no contention is made that the last clause of said Section relating to the regulation by the State of the issuance by the carrier of stocks and bonds, was not superseded and

rendered inoperative by said Section 20a of the Federal Act; this we concede.

CONCLUSION

In conclusion, we submit—

First: To maintain the jurisdiction of this court it must appear from the transcript of the record, (1) that some right, privilege or immunity is claimed under a statute of the United States; (2) that such right, privilege or immunity was seasonably and specifically set up and claimed in the State courts and, (3) that the decision of the highest court of the State was against same.

> Section 327 U. S. Judicial Code.
> *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86-112, 53 L. Ed. 417, 428, 429.

Second: It is not enough that such right, privilege or immunity was thus set up and claimed, but it must be made manifest either that the right was denied or that the judgment could not have been rendered without denying it.

> *Western Union Tel. Co.* v. *Wilson*, 213 U. S. 52; 53 L. Ed. 693.

Third: This Court will not take jurisdiction of a cause where the judgment of the State court rests on two grounds, one of which does not involve a federal question or where it does not appear on which of two grounds the judgment was based, and the non-federal ground in itself is sufficient to sustain the judgment.

> *Allen* v. *Arguimbau*, 198 U. S. 149, 49 L. Ed. 990.

Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 112, 53 L. Ed. 431.

Western Union Tel. Co. v. *Wilson*, 213 U. S. 52, 53 L. Ed. 693.

Arkansas Southern Ry. Co. v. *German Nat'l Bank*, 207 U. S. 270; 52 L. Ed. 201.

Leathe v. *Thomas*, 207 U. S. 93, 52 L. Ed. 118.

Vandalia Ry. Co. v. *Indiana*, 207 U. S. 359, 52 L. Ed. 246.

Tested by these rules, we submit that the record herein does not show such a state of facts as will confer upon this Court jurisdiction to review the final judgment herein rendered by the Supreme Court of the State.

Wherefore, we submit that the Writ of Error granted herein by this Honorable Court should be dismissed for want of jurisdiction and these Defendants in Error so pray.

But, if this relief should be denied them, they then pray, in the alternative, that the judgment of the State Supreme Court be in all things affirmed, and they pray for such other and further relief as the law and the facts may warrant, and so will they ever pray.

Respectfully submitted,

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